Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1995

LOUISE J. HAMLET,

Petitioner,

v.

THE UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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January 19, 1996

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Court of Federal Claims have jurisdiction under the Tucker Act over a contract claim where the plaintiff's pleadings allege and the uncontradicted evidence in the record shows both that the plaintiff had a contract of employment with the government promising her pay for work and requiring good cause for her dismissal, and that she was dismissed without good cause, in violation of both her contract and applicable agency regulations?

2. Is there a hybrid category of federal worker who is an "appointee" though not an "employee" as defined by the Civil Service Reform Act, whose discharge from employment is not subject to review either by the Merit System Protection Board or the courts?

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LOUISE J. HAMLET
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Petition for a Writ of Certiorari
to the United States Court
of Appeals for the Federal Circuit

Louise J. Hamlet respectfully petitions for a Writ of Certiorari to review the judgment of the Federal Circuit Court of Appeals entered in this case on August 17, 1995, for which a rehearing was denied on October 27, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit, whose judgment is sought to be reviewed, is reported as Hamlet v. United States, 63 F.3d 1097 (Fed. Cir. 1995)

(CAFC Hamlet III), and is set out in the separate Appendix to this Petition at pp. 3 to 22. The prior opinion of the United States Court of Federal Claims, Hamlet v. United States, No. 281-86C (Fed. Cl. Mar. 23, 1994) (CFC Hamlet III) is unpublished, and is reprinted in the separate Appendix to this Petition at pp. 23 to 30.

Of the two previous opinions of the Court of Appeals for the Federal Circuit reversing the earlier Claims Court dismissals of Mrs. Hamlet's suit, Hamlet v. United States, No. 93-5075 (Fed. Cir., Nov. 23, 1993, WL 481140) (CAFC Hamlet II) and Hamlet v. United States, 873 F.2d 1414 (Fed. Cir. 1989), (CAFC Hamlet I), and the first and second opinions of the United States Claims Court and Court of Federal Claims, Hamlet v. United States, No. 281-86C (Cl. Ct. Oct. 2, 1992) (CFC Hamlet II) and Hamlet v. United States, 14 Cl. Ct. 62 (1988) (CFC Hamlet I), only CAFC Hamlet I, 873 F.2d 1414 (1989) and CFC Hamlet II, No. 93-5075 (Fed. Cir. Nov. 23, 1993) are reprinted in the separate Appendix to this petition at pp. 35 and 31, respectively.

JURISDICTION

This Court has jurisdiction to review the judgment of the Court of Appeals for the Federal Circuit dismissing the case for want of jurisdiction under the Tucker Act by writ of certiorari under 28 U.S.C. §1254(l). The judgment dismissing the case was entered on August 17, 1995. A rehearing was denied on October 27, 1995.

STATUTES AND REGULATIONS INVOLVED

The Tucker Act, 28 U.S.C. §1491(a)(1) (1988 & Supp. V 1993) provides in pertinent part:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

The United States Department of Agriculture ("USDA") Agricultural Stabilization and Conservation Service ("ASCS") regulations (the "22-PM Manual") imposing limitations on the agency's right to dismiss employees require in ¶¶445 & 446, that ASCS authorities use "principles of fairness" in personnel actions, removing employees only if facts established beyond a "reasonable doubt" are "severe enough to require removing the employee," rather than some less drastic alternative such as "counselling," "improved supervision" or "a letter of reprimand."

These same regulations provide at ¶455 for the award of backpay to wrongfully discharged employees:

> An employee under permanent appointment who is restored to duty . . . is eligible for backpay as follows:
>
> (1) Backpay shall be at the rate that the employee would have earned had the employee remained on the rolls.

> (a) Pay compensation to employee for the period of suspension and separation, minus any amount earned by the employee during the period, including unemployment compensation.

The definition of "employee" for all purposes in the United States Code is contained in 5 U.S.C. §2105(a), which provides in pertinent part:

> (a) For the purpose of this title, "employee", except as otherwise provided by this section or when specifically modified, means an officer and an individual who is --
>
> (1) appointed in the civil service by one of the following acting in an official capacity--
>
> . . .
>
> (D) an individual who is an employee under this section;
>
> . . .
>
> (3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

STATEMENT OF THE CASE

Louise Hamlet was fired from her position as a program assistant in the United States Department of Agriculture ("USDA") Agricultural Stabilization and Conservation Service ("ASCS") office in Charlotte County, Virginia, on January 11, 1985. The pleadings allege and the evidence in the record shows that the firing was without good cause, breached her employment contract with the agency, and violated agency rules and regulations.[1] As a result of her dismissal she was permanently barred from further government employment with the ASCS, despite the fact that during her twenty-eight-and-one-half-year tenure with the agency prior to her discharge, she had received an unbroken string of Certificates of Satisfactory Service for her work.

In May 1986 Mrs. Hamlet filed a suit in the United States Claims Court,[2] alleging that her discharge without good cause violated her employment contract, the applicable agency regulations and her constitutional rights. Since Mrs. Hamlet was not and never had been a civil service employee, even in the "excepted" service, her claim rested in large part

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[1] While the dismissal of the case on jurisdictional grounds makes the merits of Mrs. Hamlet's claim essentially irrelevant for the purposes of this petition, it is notable that the trial court, upon hearing the only demonstrated ground for Mrs. Hamlet's dismissal, characterized it as "a minor thing" and "absurd." (Transcript of July 13, 1992 hearing at pp. 93, 111).

[2] Effective October 29, 1992, the United States Claims Court became the United States Court of Federal Claims. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, §902(a), 106 Stat. 4506, 4516. The trial court will be referred to hereinafter as the "Court of Federal Claims."

on the holding of this Court in United States v. Hopkins, 427 U.S. 123, 129 (1976) that Tucker Act jurisdiction in the Court of Federal Claims can be premised on an implied-in-fact employment contract theory based on a "series of cases from the private sector of the economy holding that the typical employee-employer relationship [is] contractual in nature."[3]

Over the next nine years, in an extraordinary and contradictory series of decisions in the Court of Federal Claims and the Court of Appeals for the Federal Circuit, Mrs. Hamlet's suit was initially dismissed for want of jurisdiction under the Tucker Act, was reinstated, was tried in the Court of Federal Claims, was dismissed again and reinstated again because the Court of Federal Claims made inadequate findings of fact and conclusions of law, and was ultimately dismissed for want of jurisdiction under the Tucker Act in a remarkable Federal Circuit opinion that *sua sponte* declared invalid the USDA ASCS regulations which had been demonstrated to have been violated in Mrs. Hamlet's dismissal and which supported her entitlement to backpay on the agency regulation claim.

The question presented for review in this case is whether the Court of Federal Claims has jurisdiction under the Tucker Act over a breach of contract case in which the pleadings allege and the uncontradicted evidence in the record shows that the plaintiff had a contract of employment with

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[3] In so holding, this Court expressly approved the earlier ruling of the Court of Federal Claims in that case that "the employment status of non-federal employees is governed by the same rules of law applicable to private employer-employee relationships." Hopkins v. United States, 206 Ct. Cl. 303, 312, 513 F.2d 1360, 1365 (1975).

the Government promising her pay for work and requiring good cause for her dismissal, and that she was dismissed without good cause, in violation both of her contract and of agency rules and regulations. The ultimate Federal Circuit ruling that there is no jurisdiction of such a claim under the Tucker Act is in direct contravention not only of this Court's ruling in United States v. Hopkins, 427 U.S. 123, 129 (1976), but of the Federal Circuit's own initial ruling in this case, CAFC Hamlet I, 873 F.2d 141 (Fed. Cir. 1989).

REASONS FOR GRANTING THE WRIT

The judgment of the United States Court of Appeals for the Federal Circuit should be reviewed by this Court because the ruling conflicts with this Court's ruling in United States v. Hopkins, 427 U.S. 123 (1976). The Federal Circuit decision wrongly restricts the jurisdiction of the Court of Federal Claims under the Tucker Act to entertain breach of employment contract and violation of agency regulation claims for the plaintiff and approximately 13,000 ASCS employees such as the plaintiff who are not and never have been covered by the civil service laws.

ARGUMENT IN SUPPORT OF THE PETITION FOR CERTIORARI

I. THE COURT OF FEDERAL CLAIMS HAS JURISDICTION UNDER THE TUCKER ACT OVER A CONTRACT CLAIM WHERE THE PLAINTIFF'S PLEADINGS ALLEGE AND THE UNCONTRADICTED EVIDENCE IN THE RECORD SHOWS BOTH THAT THE PLAINTIFF HAD A CONTRACT OF EMPLOYMENT WITH THE GOVERNMENT PROMISING HER PAY FOR

WORK AND REQUIRING GOOD CAUSE FOR HER DISMISSAL, AND THAT SHE WAS DISMISSED WITHOUT GOOD CAUSE, IN VIOLATION OF BOTH HER CONTRACT AND APPLICABLE AGENCY REGULATIONS.

The linchpin of the Federal Circuit decision to dismiss Mrs. Hamlet's breach of contract claim against the government after nine years of litigation is that the plaintiff's right to damages for breach of her employment contract rested solely on the ASCS backpay regulation declared invalid in the panel's decision (Opinion at 6, n.3). This is not true as a matter of fact or logic.

The trial record showed that the employment contract sued on arose when Mrs. Hamlet was hired, in 1956, years before the ASCS regulations were first promulgated sometime in the 1960s. The Government conceded below that Mrs. Hamlet was hired in 1956 by the authorities given the authority by 7 C.F.R. §§7.21-7.25 to "employ" workers in the ASCS county offices. She was promised pay in exchange for work and was told she had a job as long as she did a good job. This duly-authorized promise created both an entitlement to pay and a "good cause" requirement for dismissal that pre-dated and exists independently of the ASCS regulations declared invalid by the panel.

After hearing the evidence introduced both by Mrs. Hamlet and the Government at the trial on "the issue of whether a contract between Mrs. Hamlet and the United States was formed," the trial judge declared:

> Now [Mrs. Hamlet] got up on the stand today and said, 'This particular individual told me

> one, two and three. And on the strength of that, I gave up whatever I was doing before and went to work for the ASCS,' which sounds like consideration. It sounds like a promise and an acceptance. It seems to have the classic elements of a contract.

(Transcript of February 14, 1992, hearing at p. 152). The trial court then went on to rule that

> [p]laintiff has made at least a prima facie showing that she had a contract with the United States, as defined by the Federal Circuit opinion which controls this case.

(Order of April 24, 1992).

Both this Court and the Court of Federal Claims have held that the employment relationship for non-civil service employees such as Mrs. Hamlet is "inherently contractual." United States v. Hopkins, 427 U.S. 123, 129, 49 L. Ed. 2d 1361 (1976); Hopkins v. United States, 206 Ct.Cl. 303, 513 F.2d 1360.

The promise of pay for work is the essence of an employment relationship. Mrs. Hamlet showed that she had been promised continued employment -- and pay therefor -- when she was hired in 1956. In exchange for this promise, she gave the Government over twenty-eight years of satisfactory service. The only evidence in the record is that she was an "excellent" employee, until she was wrongfully fired on "absurd" grounds.

One need not be the beneficiary of a money-mandating regulation formally adopted pursuant to the Administrative Procedure Act in order to hold the United States to its duly-authorized promise. *See, e.g.*, Flathead Joint Board of Control of the Flathead, Mission and Jocko Valley Irrigation Districts v. United States, 30 Fed. Cl. 287 (1993). Mrs. Hamlet had a contractually-enforceable right to the pay and benefits she received for twenty-eight-and-one-half years, regardless of the validity *vel non* of the agency regulations declared invalid by the Federal Circuit. *See, e.g.*, Silverman v. United States, 230 Ct. Cl. 701, 679 F.2d 865, 870 (1982), where an FTC official made an express promise to pay the plaintiff for his services. The services were then performed, and the FTC was thus benefitted. The claims court found that "[b]y accepting the benefits flowing from the senior FTC official's promise of payment, the FTC ratified such promise and was bound by it."

This Court's opinion in Army and Air Force Exch. Serv. v. Sheehan, 456 U.S. 728, 738 (1982) did not overrule the holding in Hopkins. In Sheehan, unlike this case, there was no independent evidence adduced as to the plaintiff's employment status at the trial. Sheehan, 456 U.S. at 737. In this case, the evidence at trial showed that the plaintiff had an employment contract with the United States.

While this Court did rule in United States v. Fausto, 484 U.S. 439, 98 L.Ed. 2d 830 (1988), that employment contract claims against the government cannot be maintained by employees who are covered by the Civil Service Reform Act, employees in Mrs. Hamlet's position are not and never were covered by the Civil Service Reform Act. Thus the ruling in Hopkins controls Mrs. Hamlet's employment contract claim, as the Federal Court itself ruled in its initial

decision in this case, CAFC Hamlet I, 873 F.2d 1414 (Fed. Cir. 1989).

This is a simple breach of contract case, an elementary breach of the Government's promise to pay. The substantive right to compensation required for Tucker Act jurisdiction flows directly from Mrs. Hamlet's employment contract with the United States. If Mrs. Hamlet can prove both the promise and the breach, as she did in the trial court, she is entitled to recover: it is as simple as that.

II. THERE IS NO HYBRID CATEGORY OF FEDERAL WORKER WHO IS AN "APPOINTEE" THOUGH NOT AN "EMPLOYEE" AS DEFINED BY THE CIVIL SERVICE REFORM ACT, WHOSE DISCHARGE FROM EMPLOYMENT IS NOT SUBJECT TO REVIEW EITHER BY THE MERIT SYSTEM PROTECTION BOARD OR THE COURTS.

Despite the uncontradicted evidence in the record establishing that Mrs. Hamlet was employed under a contract of employment with the ASCS, and the Federal Circuit's own ruling that Mrs. Hamlet is not an "employee" within the meaning of 5 U.S.C. §2105(a), the final Federal Circuit opinion stated that "nothing in the record rebuts the presumption that a federal employee is employed by appointment and not by contract or quasi-contract." CAFC Hamlet III, 63 F.3d at 1102, Appendix at 9. By resort to this apparently irrebuttable "presumption," the Federal Circuit defined out of existence Mrs. Hamlet's right to employment contract remedies.

This creation of a hybrid class of federal employees -- "appointees" -- who are entitled neither to backpay under the Civil Service Reform Act nor to contract remedies under the Tucker Act rests upon a semantic confusion similar to conflating the dancer with the dance.

There simply is no separate category of federal employees known as "appointees" as distinct from "employees" as defined in 5 U.S.C. §2105(a), which describes those federal employees covered by the Civil Service Reform Act with reference to the term "appointee." Since Civil Service "employees" are "appointed," courts often refer to "employees-covered-by-the-Civil-Service-Act" as "appointees," but "appointee" has no separate meaning -- and is certainly not a category of government employee distinct from the definition of "employee" set out in 5 U.S.C. §2105(a). And as the Government has conceded and the Federal Circuit itself has ruled in this case, Mrs. Hamlet is most definitely not an "employee" within the meaning of 5 U.S.C. §2105(a).

The error of the Federal Circuit opinion ruling is that it turns an anecdotal shorthand description of the means by which one obtained one's job into the kind of employee one is after the employment relationship is entered into. The characteristic of the "appointee" class created by the Federal Circuit opinion in this case is that its members have none of the rights, duties or obligations accruing to "employees" within the meaning of 5 U.S.C. §2105(a), nor any of the employment contract rights to which they would otherwise be entitled pursuant to this Court's decision in United States v. Hopkins, 427 U.S. 123 (1976). Indeed, "appointees" apparently do not even have the right to insist that an agency follow its own rules and regulations with respect to

termination and discipline, in apparent contravention of this Court's ruling in Service v. Dulles, 354 U.S. 363 (1957). "Appointees," as contrasted to "employees," apparently have no rights at all.

The Assistant Personnel Officer for the ASCS, William J. Teto, testified at the trial in this case in response to specific questioning on the subject that he was aware of no definition of "appointee" of the sort ultimately adopted by the Federal Circuit. He stated that "appointee" may be defined in the federal personnel manual applicable to civil service "employees," but conceded that Mrs. Hamlet was not covered by those regulations.

One searches in vain for any case cited by the court below where "appointee" is used in any context other than that federal "employees" "appointed" within the meaning of 5 U.S.C. §2105(a) are precluded from filing contract claims against the government.

An examination of the cases upon which the Federal Circuit opinion rests demonstrates this point. The employee in Army & Air Force Exchange Service v. Sheehan, *supra*, 456 U.S. at 738-41, was denied backpay not because he was an "appointee" but because AAFES employees were specifically denied the right to backpay benefits as a matter of demonstrated congressional intent, since employees of the military exchange services were expressly excluded from coverage under 5 U.S.C. §2105(c)(1) (1994). In Mrs. Hamlet's case, by contrast, even the final Federal Circuit opinion acknowledges that "ASCS employees are not explicitly excluded from the definition of "'employee[.]'" CAFC Hamlet III, 63 F.3d at 1106, Appendix at 20.

Sheehan, therefore, has nothing to do with this case. CAFC Hamlet III, 63 F3d at 1107, Appendix at 19, n.7.

Thus it can hardly be said that the reasoning of the decision below "follows that of the Supreme Court in . . . Sheehan" CAFC Hamlet III, 63 F3d. at 1106, Appendix at 19. Congressional silence cannot fairly be said to deny a contract remedy to Mrs. Hamlet, even if silence means the ASCS backpay regulations are invalid, because the regulations are somehow "inconsistent" with something in the "penumbra" of legislative silence.

Secondly, Mrs. Hamlet, unlike the employee involved in United States v. Fausto, 484 U.S. 439, 98 L.Ed. 2d 830 (1988), is not an employee who is or ever was covered by the Civil Service Reform Act, even as an "excepted" employee, and therefore is not precluded from asserting a claim either for breach of contract or for a violation of agency regulations by that Act. To hold otherwise, as the Federal Circuit has done, is ruling that Fausto overruled Hopkins, which it did not do. The holding in CAFC Hamlet III also *sub silentio* overrules CAFC Hamlet I, 873 F.2d 1414 (Fed. Cir. 1989), Appendix at 35, which correctly held that Mrs. Hamlet's employment contract claim was cognizable under the Tucker Act.

The effect of the final Federal Circuit decision is to deny Mrs. Hamlet the right to sue on her employment contract, even though she was not and never had been included -- even negatively, in the "excepted" service -- in the comprehensive scheme established by the Civil Service Reform Act. Since employees like Mrs. Hamlet were not included in the Civil Service Act scheme, it cannot fairly be said that Congress "intended" to deny these employees

"backpay" remedies for violations of their employment contracts. The court's decision in CAFC Hamlet III converts those 13,000 ASCS employees into "people without a country" who are employees at will, despite promises of the sort which the record establishes were made to Mrs. Hamlet: that they will receive pay for their work and will not be dismissed except for good cause.

The effect of the Federal Circuit's opinion, if upheld, means that when the Government wrongfully discharges an employee in the newly-minted category of "appointee," relief is unavailable either before the Merit System Protection Board or in the courts. In the final analysis, the Federal Circuit's refusal on jurisdictional grounds to allow the Court of Federal Claims to entertain Mrs. Hamlet's request for relief under the Tucker Act constitutes a denial of any opportunity for review in any forum of the wrongful termination of her employment. This sort of result has been intolerable under our judicial system since at least as long ago as Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803), establishing the principle of judicial review of wrongful executive action on the premise that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever [s]he receives an injury."

It is respectfully submitted that the Federal Circuit's *sua sponte* creation of an ersatz category of federal "appointees" who are not "employees" within the meaning of 5 U.S.C. §2105(a) and who have no rights whatsoever, either under their contracts of employment or under the Civil Service Reform Act, is wrong and should be reversed by this Court.

CONCLUSION

By ruling that the Tucker Act confers no jurisdiction in the Court of Federal Claims over express and implied employment contract actions such as Mrs. Hamlet's, the court below has construed the Tucker Act in a manner contrary to its express terms. Further, by creating a legal category of federal employees which does not exist in fact, the Federal Circuit has denied the plaintiff a contract remedy to which she is entitled both under United States v. Hopkins, 427 U.S. 123, 129 (1976) and the Federal Circuit's own earlier decision in CAFC Hamlet I, 873 F.2d 1414 (Fed. Cir. 1989), Appendix at pp. 35. Indeed, the Federal Circuit decision has created an area of unreviewable executive action, an anomaly under our scheme of government and an unfair result that cannot in any reasonable sense be attributed to a Congressional directive. This ruling -- the third by the Federal Circuit in Mrs. Hamlet's case -- affects some 13,000 ASCS county employees in the plaintiff's position. The ruling is wrong and should be reversed.

RESPECTFULLY SUBMITTED

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CERTIFICATE OF SERVICE

I hereby certify that I placed in the United States mail, first class, postage prepaid, on January 19, 1996, three true copies of the foregoing Petition for Writ of Certiorari and the separate Appendix filed with the Petition to Domenique Kirchner, Esquire, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, D.C., 20530, Attn: Classification Unit, 2nd Floor, Todd Building.

Alexander W. Bell